Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,
Petitioner,
v.
THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA and THE UNITED STATES,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the "results obtained" by an attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is "essentially nil" *per se* and is not to be considered in ruling on a fee application. App. at 13a.

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PETITION FOR A WRIT OF CERTIORARI

Israel S. Weissbrodt, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The Court of Appeals entered judgment without an opinion affirming the judgment of the Court of Federal Claims (App. 1a). The opinion of the Court of Federal Claims (App. 2a-31a) is reported at 30 Fed. Cl. 8 (1993).

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[1] This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.1.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1994 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

This case does not turn on the provisions of any particular statute; it requires the articulation of a principle of law governing awards of attorney's fees in all cases in which the power to make such awards is vested in the federal courts and governed by federal law. In this case, that power was vested in the Court of Federal Claims, as successor to the Indian Claims Commission ("Commission"), under section 15 of the Indian Claims Commission Act, which provides, in relevant part,

> The fees of such attorney or attorneys [retained by a tribe, band, or other identifiable group of Indians] for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case.

Pub. L. No. 79-726, § 15, 60 Stat. 1049, 1053 (1946) (formerly codified at 25 U.S.C. § 70n (1976)).[2]

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[2] When the life of the Commission expired on September 30, 1978, the remaining cases on its docket were transferred to the United States Court of Claims. *See* Act of Oct. 8, 1976, Pub. L.

STATEMENT

Petitioner, Israel S. Weissbrodt ("Weissbrodt"), is a lawyer. Starting in 1949, he and other attorneys [3] represented Respondent The White Mountain Apache Tribe of Arizona (the "Tribe" or the "White Mountain Tribe") under a contingent-fee arrangement to pursue claims that the United States, as trustee for the Tribe, had mismanaged and misused the Tribe's funds and resources.[4] The case, in the nature of an accounting by a fiduciary, required an item-by-item evaluation of the government's management of tribal funds and resources, in large part as evidenced by a voluminous accounting first rendered by the Government to the Commission in this case in 1970 and extensively revised in 1975.[5] The evidence also included thousands of pages of documents, reaching back into the Nineteenth Century and spanning a period exceeding 75 years. *See* App. 34a.

In 1980, thirty years into the case, Weissbrodt negotiated a settlement on behalf of the Tribe with the De-

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No. 94-465, § 2, 90 Stat. 1990, 1991 (1976) (formerly codified at 25 U.S.C. § 70v (1976)). The United States Claims Court in turn obtained jurisdiction of such cases pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 129, 96 Stat. 25, 39 (codified prior to amendment at 28 U.S.C. § 1346(a) (1988)). Pursuant to the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, that court is now called the United States Court of Federal Claims. *See Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2037 n.1 (1993).

[3] Petitioner has applied for fees on his own behalf and as a fiduciary for his colleagues at the time of the representation.

[4] App. 3a, 30 Fed. Cl. at 10; *see White Mountain Apache Tribe of Az.* v. *United States*, 11 Cl. Ct. 614 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 538 (1994); *White Mountain Apache Tribe of Az.* v. *United States*, 26 Cl. Ct. 446 (1992), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 538 (1994).

[5] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 26 Cl. Ct. at 454-55.

partment of Justice. The settlement was the product not only of years of litigation but also of presentations to the Department of Justice as to the value of the claims of the Tribe and of a second tribe, the San Carlos Apache, whose lands border those of the White Mountain Tribe, and whose claims had been litigated along with the White Mountain Tribe's.[6] The settlement called for the entry of a $13 million judgment in favor of the White Mountain Tribe and a $10 million judgment in favor of the San Carlos Tribe. App. 5a, 30 Fed. Cl. at 11. In recommending the settlement in 1980, the Weissbrodt firm predicted that "if the Government was required to furnish additional accounting reports, and additional trials were held, and the litigation was continued to final judgments, it might take up to about ten more years before the claims could be brought to final conclusions." Report on Proposed Settlement (1980), Ex. A to Third Affidavit of I.S. Weissbrodt, executed October 5, 1992 (excerpted in Court of Appeals Appendix at 187-88).

Although the San Carlos Tribe accepted the settlement for its claims, the White Mountain Tribe followed advice given by another lawyer—one William Veeder—to reject the settlement offer. According to the trial court, three concerns drove the rejection of the settlement. The first appears insubstantial: members of the Tribe worried that the proposed language of the judgment would preclude water rights and land recovery claims—the claims that Veeder was prosecuting in a separate matter (App. 6a-7a, 30 Fed. Cl. at 11-12). Although the United States' trial counsel assured the Tribe that he would recommend the inclusion of language clarifying that the judgment would be without prejudice to those claims, Veeder was apparently unconvinced. *See* App. 6a, 30 Fed. Cl. at

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[6] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 11 Cl. Ct. at 618, 621.

11.[7] The issue was never resolved, because Veeder succeeded in blocking all efforts to move forward to settlement. Second, Tribe members were dissatisfied with the amount of the proposed settlement (App. 7a, 30 Fed. Cl. at 12); here, too, Veeder left his mark, for he had offered the Tribe visions of a huge judgment, amounting to more than ten times the amount of the proposed settlement—and exceeding by a similar factor the actual $14.4 million judgment finally obtained after another decade of litigation.[8] Finally, "a principal reason" for

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[7] Letter from Richard L. Beal to Robert C. Brauchli (March 30, 1982), Ex. O-12 to Affidavit of Robert C. Brauchli executed September 14, 1992 (excerpted in Court of Appeals Appendix at 184); Letter from I.S. Weissbrodt to Robert Brauchli (Feb. 18, 1982), Ex. C-7 to Third Weissbrodt Affidavit, executed October 5, 1992 (excerpted in Court of Appeals Appendix at 194). Even apart from the assurance of the Government's trial counsel that the settlement agreement would be revised to make this matter plain, the concern was without foundation. The release clauses in the settlement agreement only covered claims which the tribes "have asserted or could have asserted" in the docket "under the Indian Claims Commission Act" (Court of Appeals Appendix at 79, 81). Neither the Commission nor its successors, the Court of Claims and the Claims Court (now the Court of Federal Claims), had any jurisdiction to entertain a claim for ownership of water rights or of land. Their jurisdiction was restricted to pecuniary claims. Thus, neither under the terms of the settlement nor under *res judicata* principles could these other claims have been foreclosed.

[8] *See* Affidavit of Michael D. Lieder, executed Aug. 4, 1992, ¶ 13 (excerpted in Court of Appeals Appendix at 72) ("Veeder appeared at our meeting with the Tribal Council . . . and contended that, apart from the possible adverse impact of the proposed settlement on the matters that he was handling for the Tribe, it was grossly inadequate in amount."); *see also* Response to Aug. 27, 1984, Order to Show Cause, filed Sept. 19, 1984 (excerpted in Court of Appeals Appendix at 233) ("Present counsel [Veeder] recommended rejection of the offer [renewed in 1984], stressing that the damage done to Plaintiff Tribe's Reservation, through intentional mismanagement, is far closer to $130,000,000 than to $13,000,000."); *White Mountain Apache Tribe of Az.* v. *United States*, 6 Cl. Ct. 575, 577 (1984) (quoting same), *vacated*, 776 F.2d 1073 (Fed. Cir. 1985).

rejecting the offer was the Tribe's desire to "know[] what its claims were worth" by litigating to the bitter end. App. 20a, 30 Fed. Cl. at 17-18.

After Veeder had suggested that the settlement be rejected, the Tribe sought to dismiss Weissbrodt as counsel for cause. This effort was rejected by the Department of Interior, which held that no such cause existed. Following this display of no-confidence, Weissbrodt agreed to a withdrawal by mutual consent, because he recognized "that it would be difficult for him and those associated with him on the contract to continue to represent the tribe under existing circumstances." [9]

Having succeeded in blocking a settlement, Veeder later took the helm on an hourly retainer, to be paid currently and not out of the award, and set about the task of litigating the case. His effort seemed to involve more than the usual consumption of judicial resources. By the end of 1984, he had disobeyed orders requiring the pretrial exchange of written experts' reports on the theory that the court lacked jurisdiction to make such orders; he had sought mandamus and moved for discretionary interlocutory review of those orders (unsuccessfully); he had moved for recusal of the trial judge (unsuccessfully); and he had been sanctioned with a daily monetary penalty of $100 for continued disobedience of the court's pretrial orders. Three published opinions plus other orders of the trial court, and two appeals to the court of appeals, were involved in this by-play.

Finally, faced with continued disobedience of its orders, the trial court sanctioned the Tribe by dismissing its complaint, citing (in a fourth published opinion) "a lack of diligence in pursuing [the] suit and willful refusal to com-

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[9] Letter from Kenneth L. Payton, Acting Deputy Assistant Secretary, Department of the Interior, to Ronnie Lupe, Chairman, White Mountain Apache Tribe (Aug. 24, 1981), Ex. A to First Lieder Affidavit, executed Aug. 4, 1992 (excerpted in Court of Appeals Appendix at 88); *see* App. 7a, 80 Fed. Cl. at 12.

ply with orders of the court." 6 Cl. Ct. at 578. In the interests of justice, however, the court also directed the entry of judgment in favor of the Tribe in the amount of $10 million, on the ground that this was the amount of the rejected settlement offer, less a $3 million pecuniary sanction. 6 Cl. Ct. at 585. By a two-to-one vote, the court of appeals vacated the dismissal of the complaint "to give the Tribe one final opportunity to comply with [the] court's pretrial orders." App. 33a; the dissenter took the view that the trial court had acted within its discretion in light of Veeder's misbehavior. App. 35a.

With the case reinstated, another decade of litigation followed. By the end, Veeder had amassed an impressive record, at least of litigation, if not of achievement: a grand total of two trials lasting several weeks each,[10] 13 published opinions by the trial court consuming a total of 223 pages in the official reporter,[11] and five trips to the court of appeals.[12] Through it all, Veeder litigated the

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[10] The resource mismanagement claims were tried in September and October 1986, following an inspection of the reservation by the trial judge involving travel around the reservation by automobile and helicopter as well as "a fixed-wing flight crisscrossing the entire reservation." 11 Cl. Ct. at 618, 621. A second trial began in December 1991 and after a respite concluded in March 1992, involving both accounting claims and "mixed resource mismanagement/accounting claims." 26 Cl. Ct. at 447-48.

[11] 4 Cl. Ct. 575 (1984); 4 Cl. Ct. 586 (1984); 5 Cl. Ct. 288 (1984); 6 Cl. Ct. 575 (1984); 8 Cl. Ct. 677 (1985); 9 Cl. Ct. 1 (1985); 9 Cl. Ct. 32 (1985); 9 Cl. Ct. 158 (1935); 10 Cl. Ct. 115 (1986); 11 Cl. Ct. 614 (1987); 20 Cl. Ct. 371 (1990); 25 Cl. Ct. 333 (1992); 26 Cl. Ct. 446 (1992).

[12] No. 94-5018 (Fed. Cir. Aug. 17, 1993) (unpublished, but noted at 5 F.3d 1506; text available on Westlaw, 1993 WL 309619); No. 91-5060 (Fed. Cir. June 3, 1991) (unpublished, but noted at 940 F.2d 676; text available on Westlaw, 1991 WL 138480); No. 88-1251 (Fed. Cir. May 10, 1988) (unpublished); Nos. 85-895 & 85-1348 (Fed. Cir. Aug. 7, 1985) (unpublished, but noted at 776 F.2d 1063; text reproduced at App. 32a-36a); No. 84-1434 (Fed. Cir. Aug. 1, 1984) (unpublished).

case to the hilt and rebuffed the trial judge's efforts to encourage the parties to settle the case—or even to settle tiny portions of it, such as one claim of less than $100. Examples of this behavior were detailed repeatedly by the trial court in its many published opinions in the case. *See, e.g.*, 9 Cl. Ct. 1 (1985) (criticizing plaintiff for filing "wholly noncompliant" papers); 9 Cl. Ct. 32, 35 (1985) (denying motion for rehearing, noting that plaintiff offered "no excuse for having failed" to bring supposedly important facts to the court's attention the first time around); 9 Cl. Ct. 158, 163 (1985) (questioning "wisdom of using judicial resources" by plaintiff to litigate an item worth less than $100); 10 Cl. Ct. 115, 117 (1986) ("This marks the third time in the recent past in which plaintiff has simply ignored evidentiary burdens with respect to damages."); 11 Cl. Ct. 614, 645 (1987) (criticizing plaintiff for coming to trial with two untenable measures of damages on water rights mismanagement claim, despite having been "forewarned"); 20 Cl. Ct. 371, 375-76 (1990) (rebuffing plaintiff for trying to relitigate previously rejected claims and for asserting new claim that came to counsel in an "epiphany" nearly thirty-five years after the statute of limitations had run); *id.* at 373 (urging negotiated settlement, but observing that "plaintiff's misapprehension of the type of claim that remains for resolution is entirely inconsistent with a realistic prospect of achieving some success by way of negotiation"); 26 Cl. Ct. at 483-84 (1992) (critizing "serious omission on plaintiff's part" in proving damages and finding that the disbursement process complained of by plaintiff was "inherently honest and reliable," but awarding damages "despite plaintiff's failure of proof," because critical evidence from the 19th and early-20th centuries had been lost).[13]

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[13] Unpublished decisions appear to have been to the same effect. *See, e.g.*, Order entered by the trial court on Feb. 8, 1991 ("No useful purpose was served by plaintiff's filing its most recent motion. The motion was denied previously for reasons fully explained in the orders of the court. Plaintiff is on notice that

In 1992, after the decade of litigation predicted by Weissbrodt, the Tribe obtained a judgment for $14.4 million—which by November 1993 had accrued approximately $4½ million in interest (App. 3a, 30 Fed. Cl. at 10). This total amount was worth less than 90% of the value in constant dollars of the settlement the Tribe rejected.[14] Weissbrodt applied for his fees, seeking 10% of the judgment, as contemplated by his contract with the Tribe. The amount of the fee, which was contingent upon recovery, was to be fixed by the court and was limited contractually and by the terms of the Indian Claims Commission Act to 10% of the recovery.[15] The trial court stayed Weissbrodt's fee application while Veeder unsuccessfully appealed the $14.4 million judgment, contending that the Tribe's claims were worth not just the $130 million he had presented to the Tribe at the time of re-

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future motions of this nature will not be tolerated. Should plaintiff file another frivolous, repetitive motion, plaintiff will be required to pay for defendant's attorney time in responding thereto. Although the court's consideration of such filings is gratis, plaintiff's opponent should not be required to respond without reimbursement of attorney's fees.") (quoted in an unpublished opinion of the court of appeals dismissing an appeal of the plaintiff (noted at 940 F.2d 676 (Fed. Cir. 1991), and available on Westlaw, 1991 WL 138480)).

[14] Using the 1967 = 100 base period, the unadjusted CPI-U for November 1993 was 436.9, and for January 1981 it was 260.5. *See* Bureau of Labor Statistics, *CPI Detailed Report*, November 1993, p. 8; Bureau of Labor Statistics, *CPI Detailed Report*, January 1981, p. 9. Multiplying the $13 million by the November 1993 CPI-U, and dividing by the January 1981 CPI-U, results in a current value for the rejected settlement, without interest, as of November 1993, of more than $21.8 million.

[15] The almost invariable practice of the Commission and its successors in making awards, and of the Department of the Interior in taking a position on them, was to award 10% in contingent-fee cases under the Act. App. 15a, 30 Fed. Cl. at 15. The Court of Claims made it clear in *Western Shoshone Identifiable Group* v. *United States*, 652 F.2d 41 (Ct. Cl. 1981), that the three principal factors to be considered in these cases were the "results obtained,"

jection of the settlement, but $1.5 billion.[16] These amounts were, respectively, approximately ten times and approximately 100 times the damages determined at trial. (Veeder also sought certiorari, which was denied. 114 S. Ct. 538 (1994).)

Following affirmance of the judgment, the trial court took up Weissbrodt's fee application.[17] In determining the amount of attorney's fees to award to Weissbrodt, the Court of Federal Claims—like the trial courts in innumerable other fee-application cases (see *infra* pp. 13-14, 17 & nn.22-24, 28-29)—was required by the governing statute to consider, among other things, the "results obtained." See App. 11a-14a, 30 Fed. Cl. at 14-15; Indian Claims Commission Act § 15 (quoted *supra* at p. 2). Weissbrodt sought a 10% fee, arguing that the "result" he had "obtained" was the $13 million settlement offer. This had been the product of a thirty-year litigation, and had been predicted by Weissbrodt to save the Tribe and the courts 10 years of additional litigation. That the settlement offer was *better* than the ultimate judgment—and that the case voraciously consumed judicial resources for another decade—served only to highlight its value.

However, the trial court concluded that it could not consider the settlement offer as a "result obtained," because its value once it was rejected was, *per se*, "essentially nil." App. 13a, 30 Fed. Cl. at 14. Accordingly,

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the fees awarded in other claims cases, and the risks involved for the plaintiff's counsel. On appeal, Weissbrodt sought only 10% of the $13 million.

[16] Affidavit of Michael D. Lieder, executed Jan. 6, 1994 (Court of Appeals Appendix at 247-48).

[17] On behalf of the Tribe, Veeder vigorously opposed the application; the Justice Department took no position, and the Department of Interior took no position on the amount of fees to be awarded, but stated that it had no objection to the allowance of expenses. Defendant's Response to Motion of I.S. Weissbrodt for Attorney Fees and Expenses (Oct. 5, 1993) (excerpted in Court of Appeals Appendix at 234-35).

the court evaluated the fee application as though the settlement offer had never been obtained by Weissbrodt. App. 13a-14a, 30 Fed. Cl. at 14-15. It concluded that Weissbrodt and his colleagues were entitled only to $200,000, as compensation for their thirty-two year representation of the Tribe, on the ground that "no sum exists that actually inured to the benefit of the Tribe" as a result of Weissbrodt's work. App. 23a, 30 Fed. Cl. at 19. A different evaluation necessarily will ensue on remand if the trial court is required to consider the settlement offer a "result obtained" by Weissbrodt.[18]

In reaching its decision, the trial court did not acknowledge the cases from state and federal courts addressing the same issue without applying any *per se* rule that a

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[18] In that context, the statute vests authority in the trial court to determine the proper fee, once it has been apprised of the proper legal standard. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983) (remanding because trial court "did not properly consider the relationship between the extent of success and the amount of the fee award"). In this regard, we are not seeking certiorari to review other obvious errors committed by the trial court and uncorrected by the court of appeals, such as, after ruling a nil value for the settlement, its choice of a "flat fee of $200,000.00" (App. 28a, 30 Fed. Cl. at 21), which was then rationalized by working backward. In this regard, the trial court refused to accept a 50/50 allocation between the two tribes for work that benefited both (primarily during the many years when the cases were consolidated for all purposes), even though the settlement proposed for the White Mountain Tribe was *higher* than the one accepted by the San Carlos Tribe; instead, the court "discounted" the allocation, so that nearly 60% of the work was said to have been done for the San Carlos Tribe's benefit, and only 40% for that of the White Mountain Tribe (App. 27a, 30 Fed. Cl. at 21). Similarly, the court imposed a 15% penalty for failure to keep time records during the 1970s (in a contingency-fee litigation) that comported with recordkeeping standards developed in the 1980s (App. 27a, 30 Fed. Cl. at 21). And, in another ruling favoring rejection, rather than acceptance, of settlements, the court held that the hourly fee to be paid in the 1990s would be based on the prevailing hourly rates of two or three decades ago (App. 29a, 30 Fed. Cl. at 22).

rejected settlement must be ignored (see *infra* p. 17 & nn.28-29); nor did it cite any case embracing the *per se* rule. Instead, the court erroneously considered the case to be one of "first impression" (App. 10a, 30 Fed. Cl. at 13), overlooking or ignoring the many decisions of the federal and state courts in which attorneys' accomplishments in negotiating settlements for their clients that the client elected to reject were considered as valuable "results obtained" in the judicial determination of attorneys' fees. The Court of Appeals for the Federal Circuit affirmed without opinion. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS AN OPPORTUNITY TO FASHION A RULE THAT PROMOTES SETTLEMENT IN A WIDE VARIETY OF CASES, MANY OF THEM COMPLEX

This Court has repeatedly extolled the virtues of rules favoring the settlement of litigation.[19] We suggest that promulgating rules that encourage the settlement of civil actions, especially actions that tend toward complexity, serves important purposes in the fair and efficient administration of justice by the federal courts. The need for such rules continues to increase as the number of federal cases filed and the caseload per judge continues to rise.[20] In a case set for argument this Term, the Solicitor General for the United States as *amicus curiae* recently reiterated his agreement that fair rules that encourage the settlement of civil litigation promote "important public interests" and "economic efficiency." Brief

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[19] *E.g.*, *Evans* v. *Jeff D.*, 475 U.S. 717, 732-34 (1986); *Mareck* v. *Chesny*, 473 U.S. 1, 7-10 (1985); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

[20] 1992 Report of the Director of the Administrative Office of the United States Courts 60-65 (district courts seeing renewed increases in civil workload after decline in late 1980s and steady increase in criminal workload); *id.* at 56-57 (steady rises for courts of appeals).

for the United States as *Amicus Curiae* in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, No. 93-714, at 18 (O.T. 1993, filed May 12, 1994).

This case provides an important opportunity to affirm such a rule. By concluding that a settlement offer is of "no value" if it has been rejected by the client, the lower courts applied a *per se* rule that shifted a major element of the economic cost of rejecting a reasonable settlement away from the litigant rejecting it and onto the counsel who recommended the settlement. This *per se* rule actually provides an economic disincentive toward settlement. By rejecting the settlement and hiring new counsel, the litigant effectively received thirty years' worth of legal services for close to no fee. Such a windfall would appear unfair in any event. But the lower courts' rule has the added disadvantage of relieving the client from one of the economic consequences of rejecting the settlement—having to pay a percentage of the rejected settlement, to the extent that the final award is equal to or greater than it. It also discourages settlement by strengthening the hands of lawyers who might "volunteer" to obtain a better result, by wiping the slate clean of any obligation by the client to pay a contracted-for percentage fee, or a fee measured by, or even reflecting the value of, the rejected settlement, to the first lawyer.

Whether a settlement offer is a valuable "result obtained" is an issue of broad importance. Of course, it is an issue present even in contingency-fee cases not involving a federal statute and in those involving only a single plaintiff. In this context, a number of federal courts have held that contingency-fee agreements are always subject to court supervision.[21] But the issue is much broader. In

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[21] *Venegas* v. *Skaggs*, 867 F.2d 527, 532 n.6 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990); *Cooper* v. *Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983); *Hoffert* v. *General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *Allen* v. *United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979).

a wide variety of cases, the federal courts are called upon to evaluate such "results" in passing on applications for attorneys' fees, whether there is a contingent-fee arrangement or not. These cases are apt to be complex, involving multiple plaintiffs or classes or groups such as the Tribe. Litigation of that sort consumes massive amounts of judicial resources. These cases include, among others, class actions in federal court,[22] cases under the fee-shifting provisions of the civil rights laws and the Equal Access to Justice Act,[23] and a myriad of other kinds of cases in federal court in which attorneys' fees are subject to the courts' supervision.[24]

In many ways, this case provides a paradigm of the type of case most likely to suffer from the *per se* rule applied by the lower courts and most likely to benefit from the rule that we suggest. This was a complex litigation in which the plaintiff was, in essence, a group of people that were numerous enough to have a multimillion dollar claim for the aggregate wrongs done to them and their predecessors, but geographically compact enough, and with enough organizational structure, to be suscept-

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[22] Under Rule 23(e) of the Federal Rules of Civil Procedure, courts consider and approve not only settlements, but also attendant fee applications. *See, e.g., Evans* v. *Jeff D.*, 475 U.S. 717, 724 (1986); *Rawlings* v. *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Ojeda* v. *Hackney*, 452 F.2d 947, 948 (5th Cir. 1972).

[23] *See, e.g., Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983); *Commisioner* v. *Jean*, 496 U.S. 154, 160-61 (1990).

[24] *See Gilson* v. *Chock Full O'Nuts Corp.*, 331 F.2d 107, 109 (2d Cir. 1964) (en banc, per Friendly, J.) (value of settlement in attorney's fee application in securities case governed by federal law, because "remedial incidents" of federal rights of action, including attorney's fees, are matters of federal law); *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1300 (5th Cir.) (same, in bankruptcy cases), *cert. denied*, 431 U.S. 904 (1977); *In re Complaint of Cap'n Rick Corp.* (*Viventi* v. *Cap'n Rick Corp.*), 525 F. Supp. 31, 35-36 (S.D.N.Y. 1981) (same, in admiralty case), *aff'd*, 685 F.2d 423, 426 & 428 (2d Cir. 1982).

ible to internal conflict.[25] The group also was compact enough that each member had a palpable stake in the size of the recovery, in contrast to huge nationwide class actions in which each class member's financial stake may be very small. It is these cases, in which a relatively compact—but still potentially fractious—group stands to share in a large recovery, that are often the most consuming of judicial resources. A review, for example, of the ten longest civil trials (all the ones consuming more than 60 trial days) during the year ended September 30, 1992 (the latest year for which such figures are available), reveals that six of the ten involved similarly compact groups.[26]

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[25] The group dynamics that can determine whether a settlement is accepted or rejected in a case like this one are the same whether the group is viewed juridicially as a single entity (like the Tribe or a labor organization), whether a large number of individual plaintiffs are involved, or whether a class action involving a relatively compact class is presented. In the latter two situations, a settlement may be impossible if substantial numbers of individual group members refuse to settle, or, in the case of a class, exercise rights to opt out under F.R.C.P. 23(c)(2).

[26] 1992 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-9, at 220. *See In re San Juan Dupont Plaza Hotel Fire*, No. MDL 721, Amended Case Order, n.1 (D.P.R. Dec. 2, 1989) (2300 personal injury plaintiffs) (available on Westlaw, 1989 WL 168401); *In re Air Crash at Detroit Metropolitan Airport (McDonnell Douglas)*, 791 F. Supp. 1204, 1209 (E.D. Mich. 1992) (approximately 150 consolidated cases); *In re Joint Eastern & Southern Districts of New York Asbestos Litig.*, 827 F. Supp. 1014, 1023 (E. & S.D.N.Y. 1993) (sixteen personal injury plaintiffs); *City of Long Beach* v. *Standard Oil Co.*, 872 F.2d 1401, 1402 (9th Cir. 1989) (city and state for itself and its political subdivisions), *cert. denied*, 493 U.S. 1076 (1990); *Al-Jundi* v. *Rockefeller*, 885 F.2d 1060, 1062 (2d Cir. 1989) (prisoners at Attica state prison during 1971 riot); *Werlein* v. *United States*, 746 F. Supp. 887, 890 (D. Minn. 1990) (residents of area surrounding munitions plant that discharged toxic waste), *vacated pursuant to settlement*, 793 F. Supp. 898 (D. Minn. 1992).

The litigants in these cases are those often most susceptible to the "volunteer" "spoiler" counsel, who attack a proposed settlement with the promise of a huge recovery and hints of a sell-out by the original counsel who is recommending settlement. A common result, as here, of the rejection of such a settlement sponsored by initial counsel, particularly where volunteer counsel have advised against the settlement, is the discharge or withdrawal by mutual consent of the lawyer whose recommendation has been rejected. With groups of this sort, there are apt to be some internal differences of opinion, or some members of the group may have access to potential "volunteer" substitute counsel, or such volunteers have access to them, creating a likelihood of second-guessing of a proposed settlement by dissidents. Thus, it is these cases that would benefit most from a rule providing for the award of compensation to the original counsel as if the initially negotiated settlement had been accepted, for such a rule would provide a real economic incentive for accepting reasonable settlements.[27]

We do not suggest, of course, that every settlement that is negotiated by counsel ought to be accepted by the client. The client has, and must have, the right to choose. But just as the client must have the right to accept or

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[27] It is irrelevant to say, as did the trial court (App. 20a, 30 Fed. Cl. at 18), that if the ensuing litigation had resulted in a judgment that the Tribe take nothing, Weissbrodt would have been entitled to nothing, and accordingly the rejected settlement was of no value. It is true that in such a case Weissbrodt would have gotten nothing—10% (or any percent) of nothing is nothing. The result ultimately obtained is the outside limit, to be sure. But it turned out that a "take nothing" judgment was not the result. A judgment in approximately the same dollar amount but, of course, in depreciated dollars, was obtained a decade later. Indeed, it was not surprising that an amount of a similar order of magnitude to the settlement was eventually obtained, in a case involving a vast panoply of individual claims based on a large part of a century of stewardship of the United States over the Tribe's affairs—a case in the nature of an "accounting."

reject a settlement, the exercise of that right should be conditioned on facing certain obligations; and the nature of those obligations must be defined by common fairness, a due regard for the proper administration of justice, and a concern for the proper allocation of increasingly scarce judicial resources. Just as the client must be master of the decision whether to settle or not, the client must be responsible for the decision not to settle a case as recommended by counsel, and for the fair consequences of that decision.

II. THE *PER SE* RULE APPLIED BELOW IS CONTRARY TO THE AUTHORITIES

The holding below that a settlement offer once rejected is not a valuable "result obtained" by counsel conflicts with the holdings of a variety of state and federal courts. Some courts have held that a client who rejects a settlement and hires substitute counsel must be held to the letter of the bargain with the first contingent-fee counsel upon recovery.[28] Others have held that such counsel are entitled to a *quantum meruit* recovery, in which the amount of the rejected settlement is to be taken into account in assessing the value of the services provided.[29] But, so far as we can tell, no court has, until now,

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[28] *E.g.*, *Spahn* v. *United States*, 92 F. Supp. 992, 994 (E.D. Va. 1950); *Doucet* v. *Standard Supply & Hardware Co.*, 250 So. 2d 549, 550-51 (La. Ct. App. 1971); *Osius* v. *Hastings*, 97 So. 2d 623, 625-26 (Fla. Ct. App. 1957), *vacated for lack of jurisdiction*, 104 So. 2d 21 (Fla. 1958); *Dolph* v. *Speckart*, 186 P. 32, 33, 36 (Or. 1920). *Cf. McGowan* v. *Parish*, 237 U.S. 285, 299-300 (1915) (holding contingent-fee client to letter of agreement upon recovery after discharge of counsel).

[29] *E.g.*, *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 596-97 (10th Cir. 1990), *modified on other grounds*, 932 F.2d 898 (1991) (en banc); *In re Complaint of Cap'n Rick Corp.*, *supra*, at 35-36; *Blunt* v. *Northern Oneida County Landfill*, 536 N.Y.S.2d 295, 297 (N.Y. Ct. App. 1988); *Johnson* v. *Long*, 305 N.E.2d 30, 31-32 (Ill. Ct. App. 1973).

adopted a *per se* rule *excluding* the rejected settlement from consideration.

A rule treating a settlement offer—even one that was rejected—as a "result" of some value makes perfect sense as a matter of policy. It encourages settlements by providing economic incentives toward settlement. It promotes participation by counsel in cases where fees are subject to court approval, for it provides counsel an objective basis for believing that they will be compensated fairly upon negotiation of a reasonable resolution. Indeed, without such assurances, counsel are likely to be less inclined to take such cases, even if meritorious. And —perhaps most important—it recognizes that clients, the interests of justice and the administration of the judicial system are often better served by counsel who encourage them to resolve their differences fairly, rather than egg them on to "push the envelope" and test every legal and factual issue to the end. As Judge Will once said, "One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement." Hubert L. Will, *et al.*, "The Role of the Judge in the Settlement Process," *Seminar for Newly Appointed District Judges*, 75 F.R.D. 89, 203 (1976).

III. THIS CASE IS AN IDEAL VEHICLE FOR ANNOUNCING AND APPLYING THE RULE

The facts of this case present a paradigm of what can go wrong where "spoiler" counsel persuades litigants in a complex civil case to find out what their case is "really worth" by testing every legal and factual theory, no matter how unlikely to succeed, rather than resolve their case reasonably. By the time Veeder took over, the case had already gone on for thirty years, consuming substantial judicial and governmental resources.[30] Indeed, it

[30] *See Hearing on H. R. 11909 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular*

took two decades to get the Government to produce an accounting for its stewardship, and then another five years, until 1975, for it to revise that accounting to the point where it could begin to serve as a basis for a determination of the obligations owed to the Tribe.[31] The benefits of a settlement in 1980 would have been enormous. The Tribe would have received a far better recovery. Ten years of complex litigation, punctuated by frequent frivolous positions by the plaintiff, would have been pretermitted. Enormous costs to the Tribe, the Justice Department and the courts would have been avoided. It is fair to say that the only person who actually benefited from the rejection of the settlement and concommitant litigation to the bitter end was the new counsel.

This case provides the Court with an opportunity to address this subject, an important one in cases that are by their nature going to be complex, and to reject a rule that provides a disincentive to settlement by removing one of the economic consequences of rejecting a settlement. It provides the Court an opportunity, following the minimum requirement of other courts that have addressed the issue, to enunciate a proper rule: that the rejected settlement must be viewed as a "result obtained"; and that in appropriate cases a percentage fee based on the settlement must be awarded to counsel presenting a settlement, which is then rejected, to the extent that ultimately there is a recovery. Such a rule would avoid disincentives for parties to agree to settlements, appropriately encourage settlements, be fair in its application, and accord with the mainstream of judicial authority.

Affairs, 94th Cong., 2d Sess. 52 (1976) (testimony of Jerome K. Kuykendall, Chairman of the Indian Claims Commission) (describing one phase of the case, in which Weissbrodt had filed 1,500 pages of exceptions to the Government's accounting, and 73 motions for partial summary judgment).

[31] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 26 Cl. Ct. at 452-55.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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